No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should deny certiorari on the "jurisdictional question" raised in the Petition, where every circuit court to address the question has held that, under the Hobbs Act, 28 U.S.C. § 2342(1), a district court has no power to review a "final order" of the FCC interpreting the Telephone Consumer Protection Act of 1991 ("TCPA"). *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 57; *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

2. Whether the Court should decline to grant certiorari to resolve a minor difference of interpretation between the Fourth Circuit and the Second Circuit regarding the scope of the FCC's 2006 Rule stating that facsimiles offering "free goods and services" are "advertisements," as defined by the TCPA, 47 U.S.C. § 227(a)(5), where the answer will not change the result in this case and where this esoteric question is infrequently litigated.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners, who were Defendants below, are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR").

Respondent, which was Plaintiff below, is Carlton & Harris Chiropractic, Inc. ("Plaintiff"). Plaintiff has no parent corporation, and no publicly held company owns 10% or more of Plaintiff's corporate stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Petition seeks this Court's review of a decision of the U.S. Court of Appeals for the Fourth Circuit holding that a facsimile (or "fax") sent to Plaintiff's chiropractic office is an "advertisement" under the Telephone Consumer Protection Act of 1991 ("TCPA"), as that term is interpreted by the Federal Communications Commission ("FCC"), and thus subject to the rules governing fax advertising contained in the TCPA and the FCC regulations.

The Court should deny the petition because (1) every circuit court to decide the question has ruled that the FCC's interpretations of the TCPA are binding in district courts and may be challenged only by following the procedures in the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. § 2342(1), and there is no "circuit split" on this issue, as the Petition contends; and (2) the difference of interpretation between the Second Circuit and the Fourth Circuit regarding the meaning of the FCC's 2006 rule stating that faxes offering "free goods or services" are presumed to be "advertisements" does not warrant this Court's review.

STATEMENT OF THE CASE

On November 10, 2015, Plaintiff filed its Complaint alleging that Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR") sent Plaintiff and a class of others "unsolicited advertisements" in violation of the TCPA, 47 U.S.C. § 227, and the implementing FCC

regulations, 47 C.F.R. § 64.1200, including a fax on December 17, 2013 (the "Fax").

The Fax is addressed to "Practice Manager" from "PDR Network" and offers a "FREE 2014 Physicians Desk Reference eBook." (Pet. App. 51a). Fine print at the bottom of the Fax states: "To opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax, call 866-469-8327. You are receiving this fax because you are a member of the PDR Network." (*Id.*) The Complaint seeks the relief authorized by the TCPA's private right of action, 47 U.S.C. § 227(b)(3), consisting of statutory damages of $500 to $1,500 per violation and injunctive relief. (Pet. App. 47a–48a).

On February 5, 2016, PDR moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). PDR did not dispute that Plaintiff adequately alleged the Fax was "unsolicited," but argued that the Fax is not an "advertisement" as a matter of law because it "does not offer anything for purchase or sale," instead offering a "free" copy of the 2014 eBook. (Pet. App. 33a).

On March 4, 2016, Plaintiff filed its opposition to the motion to dismiss, arguing that the FCC issued a final order in 2006 interpreting the term "advertisement" in 47 U.S.C. § 227(a)(5), and ruling that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the

TCPA's definition." (Pet. App. 49a; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) ("2006 FCC Rule")). Plaintiff argued that (1) this ruling is binding in federal district courts under the Hobbs Act, 28 U.S.C. § 2342(1); and (2) that the plain language of the rule states that a fax offering free goods or services, like the Fax offering a free copy of the PDR e-book, is an "advertisement," and thus required to comply with the TCPA and the FCC regulations. (Pet. App. 39a–40a).

On September 30, 2016, the district court granted PDR's motion to dismiss. First, the Court held that because the statutory definition of "advertisement" is "clear," the "FCC's interpretation of the TCPA is not due 'substantial deference'" under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). (Pet. App. 40a).

Second, the district court held that, "even if the Court were to defer to the FCC's interpretation," the 2006 FCC Rule states that a fax must "promote" free goods or services to be an advertisement, and *promote* has "an explicit commercial nature," which it concluded was lacking in the Fax offering the free PDR e-book, making it not an "advertisement" under the 2006 FCC Rule. (Pet. App. 40a–41a). Plaintiff timely appealed to the Fourth Circuit.

On February 23, 2018, the Fourth Circuit vacated the district court's dismissal. (Pet. App. 18a). The

Fourth Circuit's decision is reported at *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018).

First, the Fourth Circuit held that "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and the district court had "no power to decide whether the FCC rule was entitled to deference." (Pet. App. 8a, 11a). The Fourth Circuit noted that this kind of "jurisdiction-channeling" provision contained in the Hobbs Act is "nothing unique," and joined the Sixth, Seventh, Eighth, and Eleventh Circuits in holding that "[b]y refusing to defer to the FCC rule and applying *Chevron* analysis instead, the [district] court acted beyond the scope of its congressionally granted authority." (*Id.* 8a–9a).

Second, having held that the 2006 FCC Rule was binding, the Fourth Circuit interpreted that rule, holding that the FCC's ruling that faxes offering "free goods or services" are advertisements is "clear and unambiguous," and "if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." (*Id.* 14a). The Fourth Circuit held that "[f]rom a natural reading of the text of the regulation, we get this simple rule: faxes that offer free goods and services are advertisements under the TCPA." (*Id.*) The Fourth Circuit held "[w]e need not 'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale," and that

"[b]ecause the plain meaning of the regulation is clear, our interpretive task is complete." (*Id.*)

The Fourth Circuit recognized that the FCC's rule treating all faxes offering free goods or services as "advertisements" subject to the TCPA and the FCC rules "may be overinclusive" and could in some cases "bar an organization from faxing offers for truly free goods and services unconnected to any commercial interest," but it held "prophylactic rules are neither uncommon nor unlawful." (*Id.* 15a). A prophylactic rule like the free-goods-or-services rule, the Fourth Circuit held, "cannot, and need not, operate with mathematical precision," and "[t]he mere fact that a regulation operates overbroadly" in some circumstances "does not render it invalid." (*Id.* (quoting *Friedman v. Heckler*, 765 F.2d 383, 388 (2d Cir. 1985)). In any case, the Fourth Circuit held that "given the increasing obsolescence of fax machines, we suspect there will be few occasions where this rule serves to block an entity wishing to offer truly free goods or services from doing so." (*Id.* 15a–16a).

The Fourth Circuit held that "although we do not reach the FCC's intent in enacting the rule," it was "reasonable" to classify all faxes offering free goods or services as "advertisements." (*Id.* 16a). The Fourth Circuit reasoned that "[t]his case illustrates why the FCC may have decided to implement so broad a rule," where Plaintiff's Complaint was dismissed without any discovery, where "few details of PDR Network's business model have emerged," and where "nothing in the record suggests that PDR Network is a charity"

with some non-commercial motive for sending the Fax. (*Id.* 17a).

The Fourth Circuit vacated the judgment and "remand[ed] for further proceedings consistent with this opinion." (*Id.* 18a).

On March 9, 2018, PDR filed a petition for rehearing en banc, which the Fourth Circuit denied without any judge calling for a vote. (*Id.* 45a).

REASONS FOR DENYING THE PETITION

I. Every circuit to address the question has held that a "final order" of the FCC interpreting the TCPA may be reviewed only by the court of appeals in a Hobbs Act proceeding, and there is no circuit split on the issue.

PDR does not argue that the Fourth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court," warranting review under Sup. Ct. R. 10(c). (Pet. at 1–32). To the contrary, PDR cites *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984), where this Court held "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals" under the Hobbs Act, 28 U.S.C. § 2342(1). (*Id.* at 29). Rather, PDR argues that there is a "circuit split" regarding whether the Hobbs Act requires a district court to follow the FCC's interpretations of the TCPA, or whether a district court can review those interpretations for *Chevron* deference. (*Id.* at 13).

There is no such split. Every circuit court to address this question has held that the FCC's interpretations of the TCPA are binding in district courts, and subject to review only in the court of appeals following the Hobbs Act procedures, and this Court denied certiorari in three of those cases. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 57;[1] *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

PDR asserts that it is not challenging the "validity" of the free-goods-or-services rule, and is instead merely asking this Court to allow the district court to hold that this rule conflicts with the "unambiguous" statute and is, therefore, not entitled to "substantial deference" under *Chevron*. (Pet. at 15). The Fourth Circuit correctly recognized that when a court holds that an agency order is not entitled to *Chevron* deference because it conflicts with an unambiguous statute, it is determining the "validity" of the order. (Pet. App. 20a). That is the same result

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[1] The 2013 *Leyse* decision superseded the Sixth Circuit's prior ruling in the case, which mistakenly ruled that the Hobbs Act did not bar the challenge to the regulation. *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 376 (6th Cir. 2012).

reached by the circuit courts in *Mais*, *Nack*, *Leyse*, and *C.E. Design*.

In *Mais*, the district court granted summary judgment for the plaintiff in a TCPA case, refusing to apply a 1992 FCC order stating that the mere "provision of a cell phone number" constitutes "prior express consent," reasoning that the rule was "inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013). The district court held "Congress could have written the statute that way, but it didn't," and so "the FCC's contrary construction is not entitled to deference" under *Chevron*. *Id.*

The *Mais* district court insisted it was not violating the Hobbs Act by declining to enforce the FCC's interpretation because "this action's central aim is not to invalidate any [FCC] order," but "to obtain damages for violations of the TCPA, a consumer protection statute." *Id.* at 1237.

The Eleventh Circuit reversed, holding that "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power" in violation of the Hobbs Act. *Mais*, 768 F.3d at 1119. The Eleventh Circuit held it made "no difference" that the validity of the FCC's interpretation arose "in a dispute between private parties," rather than a proceeding with the primary purpose of attacking the ruling. *Id.*

It held the plaintiff was "free to ask the Commission to reconsider its interpretation of 'prior express consent' and to challenge the FCC's response in the court of appeals," but the district court was bound to enforce the ruling, even if it considered it unworthy of *Chevron* deference. *Id.* at 1119–20; *see also Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (district courts "may not determine the validity of FCC orders, *including by refusing to enforce an FCC interpretation*") (citing *Mais*, 768 F.3d at1114) (emphasis added).

In *Nack*, the district court entered summary judgment for the defendant in a TCPA case, "interpreting" an FCC rule requiring "opt-out notice" on fax advertisements sent with "prior express invitation or permission" as not applying to faxes sent with express permission, reasoning that "as a whole," the TCPA applies "only to unsolicited faxes," i.e., faxes sent without permission. *Nack v. Walburg*, 2011 WL 310249, at *4–5 (E.D. Mo. Jan. 28, 2011). As in *Mais*, the district court insisted it was not "enjoining, setting aside, annulling, or suspending" the FCC rule in violation of the Hobbs Act, but "interpreting" it in a manner "consistent with the TCPA, and with Congress' and the FCC's stated intent to prevent 'unsolicited' facsimile advertisements." *Id.* at *5–6.

On appeal, the FCC filed an amicus brief arguing that the defendant's "interpretive" challenge to the rule was barred by the Hobbs Act and that, to obtain judicial review of the rule, the defendant must petition the FCC and then (if the petition was denied)

seek review in the court of appeals. *Nack*, 715 F.3d at 686 n.2. The Eighth Circuit agreed with the FCC and reversed, holding that neither the district court nor the Eighth Circuit (in the current posture) had jurisdiction to "interpret" the regulation away as contrary to the statute and that the defendant must first "challenge the validity" of the regulation before the FCC to obtain judicial review. *Id.*

The *Nack* defendant petitioned this Court to review the Eighth Circuit's decision, which was denied. *See* 134 S. Ct. 1539.

The *Nack* defendant also petitioned the FCC, which, after a notice-and-comment period, issued a final order on October 30, 2014, granting in part and denying in part. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 29 FCC Rcd. 13998 (Oct. 30, 2014) ("2014 Order"). Multiple parties (both TCPA defendants and TCPA plaintiffs, some of whom were represented by undersigned counsel, Anderson + Wanca) filed petitions for review from the 2014 Order in the Eighth Circuit and D.C. Circuit under the Hobbs Act, which were transferred and consolidated by the MDL Panel in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043. The D.C. Circuit reviewed the 2014 Order for *Chevron* deference and vacated the 2014 Order, in part. *Id.*; *see also ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (applying *Chevron* in Hobbs Act appeal from 2015 FCC order

interpreting TCPA provisions regarding autodialed voice telephone calls).

In *Leyse*, the district court dismissed a TCPA plaintiff's claim arising out of a telephone call from a local radio station, holding that the FCC issued an order in 2003 exempting such calls from the TCPA's definition of "advertisement," and that the plaintiff's challenge to the validity of that exemption was barred by the Hobbs Act. 545 Fed. App'x at 459. The Sixth Circuit affirmed, holding that "the Hobbs Act deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption was invalid or should be set aside," holding, "the Hobbs Act's jurisdictional limitations are equally applicable" regardless whether a party challenges the agency order directly or "indirectly" in a private TCPA action. *Id.* (quoting *C.E. Design*, 606 F.3d at 448).

In *C.E. Design*, the district court granted summary judgment for the defendant in a TCPA action involving fax advertisements, enforcing the FCC's interpretation that faxes sent pursuant to an "established business relationship" or "EBR" were not prohibited and that the plaintiff's argument that the FCC had no authority to create the EBR rule was barred by the Hobbs Act. 606 F.3d at 446. The Seventh Circuit affirmed, holding it made "no difference" that the challenge to the EBR rule arose in a private TCPA action instead of an action with the express purpose of attacking the rule, and that when the plaintiff "argued that the district court should ignore—or in other words, *invalidate*—the FCC's

EBR exemption for purposes of this suit, the Hobbs Act's jurisdictional bar came into play." *Id.* at 448 (emphasis added).[2]

Thus, with the addition of the Fourth Circuit's decision in this case, five circuit courts have now agreed that a district court cannot "ignore—or in other words, *invalidate*" an interpretation of the TCPA contained in a "final order" of the FCC. Under the Hobbs Act, 28 U.S.C. § 2342(1), a final order of the FCC may be reviewed for *Chevron* deference only in a court of appeals on direct appeal from the agency, as was the case in *Bais Yaakov*, 852 F.3d at 1082, and *ACA Int'l*, 885 F.3d 687.

PDR argues that the Second, Third, and Sixth Circuits would have allowed the district court to review the free-goods-or-services rule under *Chevron*. (Pet. at 17–20). None of the cases PDR cites stands for this proposition.

The Second Circuit's decision in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 93–97 (2d Cir. 2017), does not mention the Hobbs Act or *Chevron*. Rather, as discussed in Section II, below, the Second Circuit applied the free-goods-or-services rule without questioning its validity, and merely interpreted it

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[2] PDR appears to rely on *Holtzman v. Turza*, 728 F.3d 682, 687–88 (7th Cir. 2013), as evidence of its alleged circuit split (Pet. at 14), but that decision does not mention the Hobbs Act.

more narrowly than the Fourth Circuit in this case.[3] That interpretative issue—what the 2006 FCC Rule *means*—is unrelated to the "jurisdictional issue" identified in the Petition—whether the rule is subject to judicial review in a district court.

PDR cites two unreported Third Circuit decisions to show its alleged circuit split. In *Manuel v. NRA Grp. LLC*, 722 Fed. App'x 141, 148 (3d Cir. Jan. 12, 2018), the defendant relied on the FCC's interpretation of "automatic telephone dialing system" in the district court, lost on summary judgment, and then argued on appeal that the FCC's interpretation was wrong. The Third Circuit affirmed the summary judgment, holding the defendant waived the argument. *Id.* In *Dominguez v. Yahoo, Inc.*, 629 Fed. App'x 369, 373 (3d Cir. Oct. 23, 2015), the Third Circuit vacated summary judgment for the defendant on the "automatic telephone dialing system" question and remanded for the district court to reconsider in light of an intervening FCC ruling interpreting that term. Neither case stands for the proposition that a district court has jurisdiction to decide whether a final order of the FCC interpreting the TCPA should be accorded *Chevron* deference.

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[3] As discussed in Section II, the result in this case would be the same under the Second Circuit's interpretation of the free-goods-or-services rule in *Boehringer*, where the Fax "relate[s] to" PDR's business and the district court dismissed for failure to state a claim prior to any discovery into whether it was a "pretext."

Finally, PDR argues that the Sixth Circuit would have allowed the district court "to conduct a *Chevron* analysis" of the free-goods-or-services rule based on *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015). (Pet. at 18). *Sandusky* does not mention the Hobbs Act. 788 F.3d at 219–26. Nor did *Sandusky* involve a fax offering "free goods or services," implicating the 2006 FCC Rule. Rather, the fax in that case was sent by a pharmacy-benefits manager to physicians, explaining which medications were on a "formulary," and thus covered by insurance. *Id.* The Sixth Circuit did not hold that any FCC interpretation was not worthy of *Chevron* deference. *Id.* In fact, the Sixth Circuit went on to actually apply the FCC's interpretations, holding the formulary fax was "purely informational" under those interpretations. *Id.*

Finally, PDR makes a policy argument that "[s]tripped of their jurisdiction" to review FCC orders, district courts will be required to apply those orders, even if the district judge believes they conflict with an "unambiguous" statute, a result that PDR argues "undercuts the purpose of our judicial system." (Pet. at 20). PDR ignores that the Hobbs Act does not state that an FCC order can never be subject to judicial review. As the Fourth Circuit recognized, the Hobbs Act merely "channel[s]" review of such orders to the court of appeals, which is "nothing unique." (Pet. App. 8a (quoting *Blitz v. Napolitano*, 700 F.3d 733, 742 (4th Cir. 2012) (noting that agency decisions are "commonly" subject to such provisions and that "final

agency actions are generally reviewed in the courts of appeals")). The subject-matter jurisdiction of the federal district courts is controlled by statute, and the Hobbs Act does not undermine the "purpose of our judicial system," contrary to PDR's suggestion.

In sum, there is no circuit split on the "jurisdictional issue" identified in PDR's Petition, and the Petition should be denied.

II. The difference of interpretation between the Second Circuit and Fourth Circuit regarding the meaning of the free-goods-or-services rule does not warrant this Court's review.

PDR argues that the Fourth Circuit's interpretation of the free-goods-or-services rule creates a circuit split with the Second, Sixth, Ninth, and Eleventh Circuits. (Pet. at 21). Of the supposedly conflicting cases PDR cites, the only one that applies the free-goods-or-services rule is the Second Circuit's decision in *Boehringer*.

In *Boehringer*, the district court interpreted the 2006 FCC Rule to mean that a fax offering free goods or services must actually be a "pretext" to further advertising to be an "advertisement," and dismissed for failure to state a claim. 847 F.3d at 95. The Second Circuit agreed with the district court's interpretation that there must be a "pretext" in fact but nevertheless reversed the dismissal, holding that the free-seminar fax sent to the plaintiff was "plausibly" an advertisement, where the subject of the free seminar (a medical condition) "relate[d] to" the business of the

sender (manufacturing pharmaceuticals, including one in the pipeline but not yet approved, to treat that same medical condition). *Id.* at 96.

The Second Circuit held the defendant could rebut this "presumption" at summary judgment to show that the fax was not in fact a pretext, but only after discovery into, for example, "testimony of the dinner meeting participants," along with "the meeting's agenda, transcript, presentation slides, speaker list, or any internal emails or correspondences discussing the meeting." *Id.* at 97. The Second Circuit ruled the plaintiff should not, however, be required "to plead specific facts alleging that specific products or services would be, or were, promoted at the free seminar," without the benefit of any discovery because that "would impede the purposes of the TCPA," which is a "remedial statute" that "should be construed to benefit consumers." *Id.* (quoting *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013)).

Although the Second Circuit interpreted the 2006 FCC Rule more narrowly in *Boehringer* than the Fourth Circuit in this case, this difference of interpretation does not warrant this Court's review.

First, the result in this case would be the same under the Fourth Circuit's plain-language interpretation or the Second Circuit's narrower interpretation. The Second Circuit would have reversed the district court's dismissal here because, as in *Boehringer*, the Fax promoting the free 2014 e-

Book plainly "relates to [PDR's] business." *Boehringer*, 847 F.3d at 96. The Fax asks recipients to contact "customerservice@pdr.net" for additional information. (Pet. App. 51a). PDR is not a non-profit organization.[4] It is a for-profit enterprise, and the Second Circuit would presume at the pleading stage, as it did in *Boehringer*, that commercial entities do not send offers of free goods and services "for no business purpose." *Boehringer*, 847 F.3d at 95. Because the Fax in this case "relates to" PDR's for-profit business, the dismissal would be reversed under the Second Circuit standard *or* the Fourth Circuit standard, so it is a poor vehicle to resolve the difference of interpretation regarding the scope of the free-goods-or-services rule (even if this difference of interpretation were worthy of certiorari).

Second, the free-goods-or-services rule is rarely implicated in TCPA litigation. There have been only two circuit court decisions (*Boehringer* and the Fourth Circuit's opinion in this case) applying the free-goods-or-services rule in the 12 years since the FCC issued it in 2006, and only a handful of district court cases. *See, e.g.*, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 492 (W.D. Mich. 2015). Given the "increasing obsolescence of fax machines" noted by the Fourth Circuit, it is unlikely

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[4] Judge Leval's concurrence reasoned that the result might be different for free-goods-or-services faxes sent by "nonprofits." *Boehringer*, 847 F.3d at 102 (Leval, J., concurring).

that there will be many more such cases. (Pet. App. 15a–16a).

In contrast to *Boehringer*, the other cases on which PDR relies for its alleged split in authority regarding the meaning of the 2006 FCC Rule do not involve faxes offering free goods or services, and so they do not create a circuit split as to the meaning of that ruling. The Sixth Circuit's summary-judgment decision in *Sandusky*, 788 F.3d at 223, expressly contrasted the purely informational fax in that case, which merely stated which medications were on a formulary, with faxes offering "free seminars," stating that free-seminar faxes are "likely" advertisements. Thus, the Sixth Circuit would "likely" rule in Plaintiff's favor in this case, and would certainly allow Plaintiff to survive a motion to dismiss for failure to state claim and proceed to discovery and summary judgment, like the plaintiff in *Sandusky*.

The faxes at issue in the Ninth Circuit's unreported decision in *N.B. Indus. v. Wells Fargo & Co.*, 465 Fed. App'x 640 (9th Cir. 2012), contained information about an award and encouraged recipients to apply for the award. It did not discuss or even mention the free-goods-or-services rule, and so it cannot create a conflict with the Fourth Circuit's interpretation of that rule in this case, or the Second Circuit's interpretation of the rule in *Boehringer*.

Finally, PDR cites *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366–67 (11th Cir. 2017). (Pet. at 22). The fax at issue in that

case asked doctors to provide "information to complete an order already made" by their patients. *Id.* The faxes did not offer free goods or services, and the Eleventh Circuit affirmed the dismissal while distinguishing cases where the faxes "encouraged the recipient of the fax to prescribe the drug to patients" or invited doctors to attend a "free seminar" sponsored by the fax sender. *Id.* at 1367. The decision does not cite or discuss the free-goods-or-services rule, and it does not conflict with the Fourth Circuit's decision in this case with respect to the meaning of that rule. *Id.*

In sum, the difference of interpretation between the Fourth Circuit's plain-language reading of the free-goods-or-services rule and the Second Circuit's interpretation that the fax must be a "pretext" in fact would not change the outcome in this case, and the issue does not warrant this Court's review.

III. The Fourth Circuit's ruling does not "prohibit" PDR from sending faxes offering free copies of its e-book, as long as it follows the rules.

PDR complains that the Fourth Circuit's decision that the Fax is an advertisement "effectively bars" or "prohibit[s]" it from offering free copies of the e-book by fax. (Pet. at 30). PDR is mistaken. It is not necessarily unlawful to send fax advertisements. The TCPA merely requires that the fax sender obey a few simple rules.

First, the sender must either (1) obtain the recipient's "prior express invitation or permission" to send fax advertisements *or* (2) take care to send faxes

only to recipients with whom the sender has an "established business relationship" (or "EBR"). 47 U.S.C. § 227(a)(5); *id.* § 227(b)(1)(C).

Second, if the sender seeks to use the EBR safe harbor, it must obtain the recipient's fax number through the recipient's "voluntary communication" of the number to the sender, or by the recipient's voluntary inclusion of the number in a publicly available directory. 47 U.S.C. § 227(b)(1)(C)(ii).

Third, the fax sender must include an "opt-out notice" on the fax clearly and conspicuously disclosing to the recipient how to stop future faxes meeting the requirements in the statute and the implementing regulations. 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iii).

A sophisticated entity like PDR should have no difficulty complying with these requirements. The Fourth Circuit's ruling does not prevent PDR from offering free copies of its e-books via facsimile, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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